Filed 10/29/96 SEE CONCURRING AND DISSENTING OPINION

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent, H013910
(Santa Clara County
v. Super.Ct.No. 172334)

KENNETH ANTHONY WASHINGTON,

Defendant and Appellant.
_____/

KENNETH ANTHONY WASHINGTON, H014963

On Habeas Corpus.
_____/

I. Statement of the Case

Defendant Kenneth Anthony Washington appeals from a judgment entered after a jury found him guilty of two counts of first degree burglary. The jury also found true allegations that defendant had nine prior convictions that qualified as "strikes" under Penal Code section 667, subdivisions (b) through (i), popularly known as the "three strikes" law.[1]

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of Parts III, V and VI of the majority opinion and the dissenting opinion.

[1] Unless otherwise specified, all further statutory references are to the Penal Code.

On appeal, defendant claims the court gave erroneous instructions on aiding and abetting. He also claims the court erred in (1) permitting the jury to convict him of two burglaries, (2) imposing separate punishment for both burglary convictions, (3) failing to exercise discretion to impose concurrent sentences on the burglaries, (4) imposing five-year enhancements consecutive to the two burglary terms, and (5) refusing to exercise discretion to consider whether to dismiss his prior convictions in the interest of justice. Defendant further claims his prior convictions do not qualify as "strikes" under the "three strikes" law and that the law itself was not properly enacted as an urgency measure. Finally, defendant claims his attorney rendered ineffective assistance, in that he elicited defendant's drug use, did not move for acquittal on one burglary count, failed to subpoena a witness, and failed to object to a note written by a witness, evidence of his poverty, and evidence of an arrest for a domestic disturbance.

We reverse one burglary conviction, vacate the jury's findings on the prior convictions, and remand the matter for further proceedings.

Defendant also filed a petition for a writ of habeas corpus, which we have considered with his appeal. In it he asserts a claim of ineffective assistance identical to that raised in his appeal. We deny the petition.

II. Facts

At 7:15 a.m. on April 15, 1994, Mildred Bradke was walking her dog in the park next to an apartment complex on Weddell Drive in Sunnyvale. She saw two people removing the window screen from apartment 26. One of them, a slender, light-skinned black person, wearing a red bandanna, entered through the window. Bradke shouted to the man who remained outside. The man identified himself as "Newsome" and said he lived in the apartment and his wife had to go through the window because they had locked themselves out. Thereafter, the man entered through the door.

Bradke knew that Linda Auble lived in apartment 26 and a black woman named Newsome lived in apartment 24. She confirmed this by checking the building's directory. She then left a note in the manager's mailbox, reporting what she had seen and describing the man as a "heavy Black man" and the other person as a "slim person in green slacks."[2]

The apartment manager Luis Villasenor found the note and at 8:30 a.m. checked apartment 26. The screen was in place, and nothing seemed wrong. He attempted without success to call

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[2] At trial, Bradke was unable to identify defendant from a photo layout. She later testified that one of the photos was similar to defendant. She also testified that defendant was similar to the man who entered the apartment. She later told Detective Mark B. Sole that she could not identify defendant as the man she saw and said she did not believe he was the man.

Auble. Later, at 9:30 a.m., Villasenor was making service calls and writing in a book, when defendant approached from a nearby car, tried to see what Villasenor was writing, and said he was interested in renting an apartment. A second black person was in the car.

Villasenor showed defendant apartment 29, which was vacant, and then started back to his office. Remembering Bradke's note, Villasenor instead went to apartment 26. Defendant was standing outside the window while someone else entered. The screen was off. Defendant said “manager” and “stay still.” Villasenor asked who had gone through the window, but defendant denied knowing anything about it and said he was visiting someone in apartment 24. Villasenor went to the assistant manager's apartment and asked her to call 911. He heard defendant knock on apartment 26 and say, “Let's get out of here, they are calling the cops.” A tall thin woman with a red bandanna ran out, and she and defendant ran to a nearby car. Villasenor followed. Defendant removed the rear license plate, and then he, the woman, and a third person sped away.

Villasenor entered Auble's apartment and called the Police. Officer Robert Mongrain of the San Jose Police Department arrived. He found no usable fingerprints inside the apartment. Villasenor took Mongrain to his office to get Auble's phone number. There, a man called, asked if the police were there, and wanted Auble's phone number. Villasenor recognized defendant's voice and gave the phone to Mongrain. The caller said he and

Auble were friends and could “straighten this all out.” When Mongrain asked the caller to come there, the caller declined, saying he had two felonies and this would be a “third strike.” The man called back later and got Auble's phone number.

Villasenor and Mongrain went to apartment 24 because Villasenor said defendant was the occupant's, Helena Newsome's, boyfriend. The door was unlocked. The screen was on the window. From there, they went to Auble's apartment. The previous caller phoned there but said he would call back later.

When Auble arrived, she said a cordless phone, a clock radio, and eight dollars in change were missing. When she left that morning the screen was on the window. Villasenor described to her the man he had seen. Auble said it was defendant, Newsome's boyfriend. Auble had seen him for a few months but had never given him permission to enter her apartment. While Mongrain was still at the apartment, the man who had called earlier called and said something to the effect that he would not do that to her. Auble became upset and hung up. He called again and identified himself to Mongrain as defendant. He denied taking part in the incident and blamed two other “guys” he met in East Palo Alto but did not know. He said he would find out and tell his parole officer.

At trial, Helena Newsome testified that she met defendant in October 1993 and had written to him while he was in Folsom prison. After his release, they became romantically involved and were presently engaged. On April 15, 1994, he was in the process

of moving into her apartment. However, she had not seen him for a week because they had had an argument. She testified that defendant had been with a woman named Vicky, who was skinny and wore a bandanna. Newsome said defendant was unemployed but she gave him “living money” and “gas money” and let him use her car. She said he did not have a key to her apartment on April 15 but had permission to enter through the window if necessary.

Two weeks after the burglary, police responded to a neighbor's report of a domestic disturbance at Vicky Bell’s home and arrested defendant. Police learned there was a parole hold on defendant stemming from the burglary. Officer Mark Sole. According to Sole, defendant said he paid a man named Jack to drive him and Vicky Bell from East Palo Alto to Newsome's apartment so he could take a shower. While Jack stayed in the car, he and Bell broke into Newsome's apartment, with permission. Defendant said that when he finished showering, Bell was gone. He heard a commotion at apartment 26. He went outside and because he was on parole told Bell to get out of that apartment. She did, and they walked to the car where Jack was waiting. He bent the rear license plate so it could not be read. Bell had a telephone and a clock radio.

The Defense

Defendant testified and repeated what he told Officer Sole but added more detail. He said he had to shower at Newsome's because he had a job interview at Great America. When he, Jack,

and Bell arrived at Newsome's apartment, Jack waited in his car. Defendant said he told a woman with a dog that he lived in the apartment and explained that his girlfriend was going in to open the door because he had left the keys inside. After entering, Bell left to get cigarettes. When she returned, defendant went outside and asked Jack to wait a bit longer because he was waiting for a call from Great America. On his way back to the apartment, defendant met Villasenor. He denied trying to see what Villasenor was writing. He asked about renting an apartment because he was not sure his plans with Newsome would work out. He explained that his mother said she would pay his rent. After Villasenor showed him an apartment, defendant returned to Newsome's apartment and made some phone calls. Bell was gone.

Defendant then heard Villasenor yelling to him about someone going into an apartment. Defendant said he did not know who it was but looked in and saw Bell, who motioned for him to be quiet. Instead, he told her to get out because the manager had seen her enter and was now calling the police. He then said, “Let's get out of there.” Bell ran out to the car, and he panicked, followed her, and bent Jack's rear license plate so Villasenor could not read it. All three then drove away. He did not see stolen property in the car.

In the car, Bell asked defendant why he was worried. He had not done anything. She said if necessary, she would testify “like I did everything.” Defendant asked her to go immediately with him and tell his parole officer. They brought defendant to

his mother's house, where he phoned his parole agent, Mr. Watkins. He said someone had burglarized an apartment and he would not say who unless "push came to shove."

Defendant said that he later called Villasenor to get Auble's number to tell her about the burglary. He had Bell call Auble and say it was defendant's sister. Auble yelled and hung up on her. Defendant called back and tried to explain that he would never have burglarized her home. She said she wanted her property back, and he said he would pay for it, begged her not to press charges, and said he would be in prison for life if she did. She hung up. He said he later identified Jack and Bell to Officer Mongrain.

Defendant explained that when he spoke to Officer Sole, he identified Jack and Bell but did not tell him everything because he has learned that saying too much "comes back on you like it's doing on me now." He said he had asked and Bell agreed to turn herself in.

Defendant admitted he fled because he did not want to be arrested and that he lied to Officer Mongrain when he told him about "two guys" whom he did not know. He said he protected Bell because they were close.

III. Retrospective Application of Montoya

The burglaries here occurred on April 15, 1994. At that time, a person could not be convicted of burglary as an aider and abettor unless the trier of fact found that he or she formed the

intent to aid and abet before or while the actual perpetrator entered with the requisite intent. (People v. Macedo (1989) 213 Cal.App.3d 554, 558; People v. Forte (1988) 204 Cal.App.3d 1317, 1321-1322; People v. Brady (1987) 190 Cal.App.3d 124, 132-134; People v. Markus (1978) 82 Cal.App.3d 477, 481-482; see People v. Escobar (1992) 7 Cal.App.4th 1430, 1435-1436.) The rule was embodied in former CALJIC No. 14.54 (1989 New), and in People v. Brady, supra, 190 Cal.App.3d at pp. 133-134, the court found the failure to give this instruction reversible error.

In June 1994, the Supreme Court filed People v. Montoya (1994) 7 Cal.4th 1027, in which it held that for purposes of determining a defendant's liability for burglary as an aider and abettor, a burglary is ongoing while the direct perpetrator remains inside the burglarized premises. (Id. at pp. 1043-1045.) Thus, one may be liable for burglary if he or she forms the requisite intent to aid and abet the perpetrator any time before that person leaves the premises. The court disapproved Markus, Brady, Forte, and Macedo, cited above, to the extent they

conflicted with its holding. (Id. at p. 1040.) The court in this case instructed the jury in accordance with Montoya. (See CALJIC No. 14.54 (1994 rev.).)

Defendant contends the court should have given a pre-Montoya instruction and claims that in applying Montoya retrospectively to this case, the court denied him due process of law. We agree.[3]

Recently, in People v. Farley (1996) 45 Cal.App.4th 1697, the defendant raised the identical claim on facts essentially the same as those here. We held that giving the Montoya instruction violated the prohibition against ex post facto laws applicable to judicial decisions because it constituted an unforeseeable change in the law that increased the punishment for conduct after it was committed. (Id. at pp. 1708-1709; see U.S. Const., art. I, §§ 9, 10; Cal. Const., art. I, § 9; People v. King (1993) 5 Cal.4th 59,

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[3] This claim is directed to the burglary that occurred around 10:00 a.m. It is undisputed that defendant did not himself enter Auble's apartment at this time. Villasenor said he saw a person enter Auble's apartment and then heard defendant tell that person to get out because someone called the police. Defendant testified he did not know Bell was inside until after she entered and only then decided to help her escape. If believed, defendant's testimony would support a finding that he did not form the intent to aid and abet her until after she entered. Thus, if Montoya does not apply, the evidence would have required pre-Montoya instructions. (See People v. Sedeno (1974) 10 Cal.3d 703, 715, disapproved on other grounds in People v. Flannel (1979) 25 Cal.3d 668, 684, fn. 12 [duty to instruct on general principles of law relevant to issues raised by evidence]; see, e.g., People v. Forte, supra, 204 Cal.App.3d 1317.) The People do not argue otherwise and claim only that Montoya applies.

79; People v. Wharton (1991) 53 Cal.3d 522.) In reaching this conclusion, we rejected the People's claim that the ex post facto prohibition applies only when a judicial decision criminalizes acts that were completely innocent when committed. It does not, and the prohibition applies where punishment for criminal conduct is increased after it is committed. (People v. Farley, supra, 45 Cal.App.4th at pp. 1706-1707.) We also rejected the People's claim that the aiding and abetting statute and the fact that the defendant's conduct was proscribed under other laws gave him adequate notice of potential liability as an aider and abettor to burglary. Established case law at the time of the offense nullified any such notice. (Id. at pp. 1707-1708.)

Finally, we rejected the People's claim that given People v. Cooper (1991) 53 Cal.3d 1158, which predated the defendant's offense, the holding in Montoya was not unforeseeable, unexpected, or indefensible by reference to the prior case law. (People v. Farley, supra, 45 Cal.App.4th at pp. 1708-1709.) Cooper held that for the purpose of determining the liability of an aider and abettor for robbery, a robbery continues until all acts constituting the offense, i.e., its elements, have been completed. Since asportation of the stolen property is an element, the offense continues "so long as the loot is being carried away to a place of temporary safety." (People v. Cooper, supra, 53 Cal.3d at pp. 1164-1170.) In Farley, we noted that this "elements" analysis does not obviously or necessarily lead to the holding in Montoya, for one can reasonably view the

element of entry, i.e., the act of entering, as having ceased or as being completed once the burglar is completely inside the premises. Thus, the pre-Montoya rule is not clearly inconsistent with Cooper. (People v. Farley, supra, 45 Cal.App.4th at p. 1708.) Indeed, we pointed out that Cooper cited with apparent approval some of the cases it later disapproved in Montoya. Last, we explained that the Montoya analysis differed from that in Cooper. Where Cooper used an "elements" analysis to determine when a robbery ended, Montoya relied on policy to determine when a burglary ended. The court reasoned that liability for burglary must continue until the burglar leaves because the danger created upon entry does not terminate when entry has been accomplished but continues as long as the burglar remains inside the premises. (People v. Montoya, supra, 7 Cal.4th at p. 1043.)

Under the circumstances, we concluded that Montoya was not reasonably foreseeable, that is, it did not provide constitutionally adequate notice of increased punishment before the defendant aided and abetted the actual perpetrator. Moreover, we noted that the pre-Montoya rule had been consistently applied by appellate courts and that whether existing judicial precedent will be overruled is generally a matter of speculation and conjecture. (People v. King, supra, 5 Cal.4th at p. 80.)[4]

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[4] Our dissenting colleague asserts that the court in Montoya implied its holding was retroactive when it said the pre-Montoya CALJIC instruction should not be given "in any case . . . ." (People v. Montoya, supra, 7 Cal.4th at p.

continued

We follow our holding in Farley and here conclude that the trial court erred in giving the Montoya instruction. This error violated defendant's right to due process and therefore is of federal constitutional dimension and must be reviewed under the Chapman[5] harmless-beyond-a-reasonable-doubt standard of review.

We find the error prejudicial. The case was presented to the jury on an erroneous legal theory, which permitted it to convict defendant as an aider and abettor not only without considering whether he formed the intent to aid and abet Bell before she entered the Auble's apartment but also if he formed the intent thereafter. Indeed, the jury could have believed defendant's testimony, which should have limited his liability to that of an accessory, and still convicted him of burglary. Moreover, the prosecutor emphasized the Montoya instruction and fashioned his argument around it. Finally, the record does not reveal that the jury resolved the issue of when defendant intended to aid Bell and found that he did so before her entry under other properly given instructions. Nor is there overwhelming evidence that he intended to aid and abet Bell before she entered Auble's apartment for the second time.[6] Under

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1047.) However, in Farley, we rejected this view, noting that "when the court decides whether a holding is retroactive, it does so expressly after careful analysis." (People v. Farley, supra, 45 Cal.App.4th at p. 1706, fn. 3.)

[5] Chapman v. California (1967) 386 U.S. 18. 24.

[6] Defendant's conviction for the first burglary does not conclusively reveal a jury finding that he intended to aid Bell before her second entry. Indeed, it is unclear what

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the circumstances, therefore, we are not convinced beyond a reasonable doubt that the erroneous instruction did not contribute to defendant's conviction for the later burglary.[7]

IV. Multiple Convictions

As noted above, defendant was convicted of two burglaries, and the court imposed separate terms for each one. Defendant contends that as a matter of law he could only be convicted of one burglary. Alternatively, he claims that the court erred in failing to instruct on the issue of whether his conduct constituted one or two burglaries.

According to defendant the evidence showed that after the first entry into Auble's apartment, he and Bell "remained in the vicinity of the apartment, with both (or [Bell], at least) waiting for the opportunity to complete the plan." Defendant argues that these facts, in turn, establish as a matter of law that the two entries into Auble's apartment were part of a single intention, impulse, and plan to burglarize it. Under these circumstances, he claims he could only be convicted of one

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theory the jury relied upon in convicting him for the first burglary. There is evidence that at the time of that burglary, defendant helped Bell enter and then entered himself. Thus, the jury could have found defendant to be a direct perpetrator or an aider and abettor.

[7] The People do not argue any error in giving the Montoya instruction was harmless.

burglary. In support of this claim, defendant relies primarily on People v. Bailey (1961) 55 Cal.2d 514.[8]

In Bailey, the defendant was convicted of grand theft based on evidence she unlawfully received numerous welfare checks each less than $200 but aggregating to more that amount.[9] (supra, 55 Cal.2d at pp. 515, 518.) In dicta, the court discussed whether the defendant was guilty of grand theft or a series of petty thefts. The trial court had instructed the jury that if several thefts are done pursuant to an initial design to take more than $200 and more than that amount is taken, there is one crime of grand theft. However, if there is no such initial design, then the taking of less than $200 is petty theft. (Id. at pp. 518-520; see CALJIC No. 14.31.) In approving this instruction, the court noted that in theft-by-false-pretense cases, the separate receipt of various amounts of money as part of "a single plan" "may be cumulated to constitute but one offense of grand theft." (Id. at p. 518.) In those cases, as well as in larceny and embezzlement cases, the applicable test is "whether the evidence discloses one general intent or separate and distinct intents."

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[8] Our reversal of the second burglary conviction does not render this claim moot, for the issue raised affects whether the reversed count may be retried.

Reversal of one count does, however, render it unnecessary to address defendant's related claim that even if he could be convicted of two burglaries, section 654 prohibited separately punishing both.

[9] At the time, grand theft involved, among other things, theft of money exceeding $200. (See former § 487.)

(Id. at p. 519.) The court then opined, "[w]hether a series of wrongful acts constitutes a single offense or multiple offenses depends upon the facts of each case, and a defendant may be properly convicted upon separate counts charging grand theft from the same person if the evidence shows that the offenses are separate and distinct and were not committed pursuant to one intention, one general impulse, and one plan." (Ibid.)

The single-intent-and-plan doctrine or test articulated in Bailey has been consistently applied in theft cases. (See, e.g., People v. Sullivan (1978) 80 Cal.App.3d 16 [error not to give Bailey instruction where evidence supports finding one intent and plan concerning multiple misappropriations]; People v. Packard (1982) 131 Cal.App.3d 622 [affirming one count of grand theft and reversing others where no evidence of separate intents and plans]; People v. Kronemyer (1987) 189 Cal.App.3d 314 [following Packard]; see also 2 Witkin and Epstein, Cal. Criminal Law (2d ed. 1988) Crimes Against Property, §§ 572-573, pp. 649-651.)

In In re William S. (1989) 208 Cal.App.3d 313, however, the court declined to apply it in a multiple-entry burglary case. There, as here, the evidence revealed two entries into the same residence hours apart. The court explained that the Bailey test was developed for theft cases. "Although thefts were involved here, to be sure, burglary is a considerably different offense. The gist of burglary is the entry into a structure with felonious intent. Technically at least, a new burglary occurs with every

new entry." (Id. at p. 317; Cf. also People v. Neder (1971) 16 Cal.App.3d 846 [Bailey inapplicable to multiple forgeries].)

Although it rejected the Bailey test, the court nevertheless felt obligated to fashion a special test for multiple-entry burglary cases. The court reasoned that under certain circumstances, allowing separate convictions for every entry could produce "absurd results." (In re William S., supra, 208 Cal.App.3d at p. 317.) For example, where "a thief reaches into a window twice attempting, unsuccessfully, to steal the same potted geranium, he could potentially be convicted of two separate counts." To avoid such results, the court analogized burglary to sex crimes, "where a different multiple entry question poses similar puzzling problems for judges and juries[,]" and adopted the test formulated in People v. Hammon (1987) 191 Cal.App.3d 1084, 1099, to determine whether one or more sex crimes have been committed. Quoting Hammon, the court stated, "'[W]hen there is a pause . . . sufficient to give defendant a reasonable opportunity to reflect upon his conduct, and the [action by defendant] is nevertheless renewed, a new and separate crime is committed.'" (In re William S., supra, 208 Cal.App.3d at p. 317.)

As both parties correctly note, the legal basis for this new test disappeared when the court in People v. Harrison (1989) 48 Cal.3d 321 disapproved Hammon. (Id. at pp. 332-334.) In Harrison, the defendant claimed his seriatim digital penetrations of the same victim during a continuous assault constituted a

single offense. In rejecting this claim, the court explained that given the history and language of the applicable statute (§ 289), a new and separate offense is completed with each new and separate penetration, however slight. (Id. at p. 329.) In disapproving Hammon, the court faulted it for focusing on perceived sentencing disparities arising from multiple convictions instead of analyzing "the sufficiency of the evidence in terms of the particular statutory violations at issue." (Id. at p. 332.) The court also faulted Hammon for adding totally irrelevant factors to the statutory definition of the offense. (Ibid.)

We agree with the parties that Harrison casts substantial doubt over William S. and use of the Hammon test in multiple-entry burglary cases because it would, in effect, add to the statutory definition of burglary.

Defendant argues that we must nevertheless fill the vacuum created by the loss of the William S. test and urges us to adopt a test based on Bailey: if multiple entries are made pursuant to one intention, one general impulse, and one plan, then there can be only one conviction for burglary. We decline to do so.

As noted above, the court in William S., rejected use of the Bailey rule because of the essential difference between theft and burglary. In People v. Neder, supra, 16 Cal.App.3d 846, the court found Bailey inapplicable to multiple forgery convictions. The court acknowledged that the multiple forgeries were probably motivated by a single intent to obtain property from the same

victim. Nevertheless the court distinguished forgery from theft. It noted that the essence of theft is a taking. Thus, "[i]f a certain amount of money or property has been taken pursuant to one plan, it is most reasonable to consider the whole plan rather than to differentiate each component part."[10] (Id. at p. 852.) Forgery, on the other hand, "is not concerned with the end, i.e., what is obtained or taken by the forgery; it has to do with the means, i.e., the act of signing the name of another with intent to defraud and without authority, or of falsely making a document, or of uttering the document with intent to defraud." (Id. at pp. 852-853.) The court opined that while "theft pursuant to a plan can be viewed as a large total taking accomplished by smaller takings[,] [i]t is difficult to apply an analogous concept to forgery. The designation of a series of forgeries as one forgery would be a confusing fiction." (Id. at p. 853, fn. omitted.)

We believe the difference between theft and burglary make application of the Bailey rule inappropriate. We also find the Neder's analysis apropos. Although in many cases the goal of a burglary is theft, burglary occurs regardless of whether a theft is accomplished or even attempted. More importantly, the conduct

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[10] Witkin makes the same point, explaining the theory behind the Bailey test is that "the defendant obtained possession of the desired money or property by unlawful means, and his guilt was determined by that fact and not by the methods employed." (2 Witkin and Epstein, supra, § 573, p. 650.)

described and proscribed by section 459 is a single act: entry. Designating a series of separate and factually distinct entries as one single entry is no less an unreasonable fiction than designating a series of forgeries one forgery or a series of penetrations a single rape.

The Bailey rule also appears too broad. Under it, a person who planned to steal everything in a residence by unlawfully entering it once everyday for a week until all the contents are taken could be convicted of only one burglary regardless of how many unlawful entries he or she made. Such a result, however, disregards the number of culpable acts committed by such a perpetrator. It also ignores that the proscription against residential burglary is designed not so much to deter trespass and the intended crime but to prevent risk of physical harm to others that arises upon the unauthorized entry itself.[11] (See People v. Gauze (1975) 15 Cal.3d 709, 714.)

We acknowledge dicta in People v. Montoya, supra, 7 Cal.4th 1027, where the court stated, "In the present case, defendants were charged with and convicted of a single burglary, and the evidence demonstrates that the multiple entries were 'committed

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[11] Although the risk of harm to others may appear to be less when a person makes multiple entries within shorter periods of time, we do not believe the risk necessarily disappears or ceases to be a reason against adopting the Bailey rule. For example, residents who hear someone enter may hide and upon hearing the person exit leave their place of hiding only to encounter the intruder as he or she reenters to obtain more loot.

pursuant to one intention, one general impulse, and one plan.' (People v. Bailey [,supra,] 55 Cal.2d [at p. 519] . . . ; see In re William S., supra, 208 Cal.App.3d [at pp. 316-318].) Accordingly, we need not concern ourselves with whether multiple burglaries properly could have been alleged or proved. (Cf. In re William S., supra, 208 Cal.App.3d [at pp. 315-318] [upholding separate convictions for second entry into burglarized residence several hours after first entry]; People v. Harrison[, supra,] 48 Cal.3d [at pp. 327-334] . . . [separate convictions for consecutive sexual penetrations with foreign object upheld] . . . ." (People v. Montoya, supra, 7 Cal.4th at p. 1046, fn. 10.)

This dicta does not suggest that the court considers the Bailey rule applicable in multiple-entry burglary cases. This is especially so given the court's citation to Harrison, where, as noted above, it concluded that each penetration during the course of a continuous sexual assault can support a separate conviction. At most, the court considers the issue an open question. We conclude that the Bailey rule is inappropriate and inapplicable.

Moreover we do not believe the theoretical possibility of multiple convictions in certain extreme hypothetical fact situations, like that posed in William S. involving the unsuccessful geranium thief, requires creation of a special rule to prevent what may appear to be absurd results. In this regard, we agree with the People that concern about absurd results are better resolved under section 654, which limits the punishment

for separate offenses committed during a single transaction, than by a rule that, in effect, creates the new crime of continuous burglary. Consequently, we follow the underlying reasoning of the court in William S.: since burglary is analogous to crimes of sexual penetration, it is appropriate to apply the same analysis.[12] The applicable analysis is found in Harrison.

As noted above, the court in Harrison concluded that since crimes of sexual penetration are complete upon penetration, however slight, multiple penetrations supported multiple convictions. We point out that the court's analysis was not based on the sexual nature of the offenses or the fact that the offenses involved physical acts against people. Rather, the analysis was dictated solely by the statutory language and the temporal threshold for establishing guilt, i.e., when the offense is complete for purposes of prosecution. (People v. Harrison, supra, 48 Cal.3d at pp. 327-329.) Thus, we do not find the Harrison's analysis inherently limited to sexual offenses and consider it proper and appropriate to apply it here.

Under section 459, burglary consists of an unlawful entry with the intent to commit a felony. Thus, the crime is complete, i.e., one may be prosecuted and held liable for burglary, upon entry with the requisite intent. (People v. Montoya, supra, 7

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[12] In Montoya, the court also observed that the invasive act comprising a burglary may be analogized to sexual offenses which have a similar element of unwanted personal invasion. (supra, 7 Cal.4th at p. 1045.)

Cal.4th at pp. 1041-1042.) It follows, therefore, that every entry with the requisite intent supports a separate conviction.

Given our discussion, we conclude that defendant was properly charged and could properly have been convicted of two burglaries.[13]

V. Ineffective Assistance of Counsel

Defendant notes numerous acts and omissions by defense counsel and contends that they reflect ineffective assistance of counsel.

To prevail on a claim of ineffective assistance, a defendant must establish that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and that but for counsel's failings, there is a reasonable probability defendant would have obtained a more favorable result, i.e., a probability sufficient to undermine confidence in the outcome. (In re Clark (1993) 5 Cal.4th 750, 766; People v. Mitcham (1992) 1 Cal.4th 1027, 1057-1058; see Strickland v. Washington (1984) 466 U.S. 668, 687-688.)

On appeal, we "consider whether the record contains any explanation for the challenged aspects of the representation provided by counsel." (People v. Mitcham, supra, 1 Cal.4th at p. 1058) If none appears, then we will reject defendant's claim

[13] Given our conclusion, we necessarily reject defendant's claim that the court erred in failing to give the jury appropriate instructions so it could decide whether defendant committed one or two burglaries.

unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation. (People v. Haskett (1990) 52 Cal.3d 210, 248; see People v. Pope (1979) 23 Cal.3d 412, 425.)

A. Failure to Move for Acquittal

Defendant faults counsel for not moving for acquittal on the first burglary at the close of the prosecution's case. He notes that Bradke could not identify defendant at trial and in fact did not believe defendant was the person she spoke to and later saw enter Auble's apartment. Thus, he argues that at the close of the prosecution's case, the only evidence that defendant entered was testimony of a highly unreliable witness who did not believe defendant was the person she saw. We are unpersuaded.

Where, as here, a claim is based on trial counsel's failure to make a motion, a defendant must prove not only the absence of a reasonable tactical explanation for the omission but also that the motion or objection would have been meritorious. (People v. Mattson (1990) 50 Cal.3d 826, 876.)

The record reflects that although she was uncertain about her identification, Bradke was certain she saw a person with a red bandanna enter Auble's apartment, she yelled to a man and asked him what he was doing, he explained his name was “Newsome,” and he later entered apartment 26 through the door. After his arrest, defendant told Officer Sole that a woman had yelled at him as he was climbing in the window of an apartment. However, he was entering Newsome's, not Auble's, apartment. He told her

he was locked out of his apartment, returned and entered it. Given this evidence, counsel could reasonably have concluded that the critical issue on the first burglary was not defendant's identity as the man Bradke saw and spoke to, but rather which apartment Bell and defendant entered. Moreover, since Bradke's testimony was sufficient to establish that it was apartment 26, counsel could reasonably have concluded that a motion for acquittal would have been denied. Given the evidence supporting the first burglary, we find no reasonably probability that a motion for acquittal would have been granted. Thus, defendant's claim of ineffective assistance fails.[14]

B. Failure to Object to Bradke's Note

Defendant contends that the note Bradke wrote and placed in the apartment manager's mailbox shortly after seeing two people enter Auble's apartment was inadmissible hearsay and, therefore, counsel, should have objected to its admission.

The People claim the note was admissible under Evidence Code section 1241, a hearsay exception for contemporaneous statements

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[14] For similar reasons, we reject defendant's claim that counsel was ineffective for not objecting to testimony from Newsome that defendant depended on her for money. We do not find counsel's omission tactically unreasonable. Defendant admitted that at the time of the burglaries he was unemployed and looking for work. Thus, counsel could have reasonably believed that Newsome's testimony would implicitly corroborate his testimony.

Moreover, given the evidence of guilt on the first burglary, we find no reasonable probability defendant would have been acquitted even if an objection been made and sustained.

by a witness. However, this exception applies only where the declarant's conduct is equivocal or ambiguous and relevant. Under such circumstances, a contemporaneous statement helps explain the conduct or make it more understandable. (See 1 Witkin, Cal. Evidence (3d ed. 1986) § 722, pp. 705-706.) Here, however, Bradke's conduct was not ambiguous or equivocal. Nor was it relevant. We also agree with defendant that the note was not admissible as a prior consistent statement, for it was not admitted to rehabilitate Bradke's credibility. (See Evid. Code, §§ 791, 1236.)

Assuming the note was inadmissible and counsel should have objected to its admission, the failure to do so was harmless. Again, the note was only relevant to the first burglary, and identity was not the issue. As noted above, defendant admitted talking to Bradke but said he was entering Newsome's, rather than Auble's, apartment. Thus, at most, the note merely confirmed Bradke's otherwise unqualified, and unimpeached testimony at trial that she had an unobstructed view of apartment 26, she was acquainted with the person who lived there, and she was positive that two people entered that apartment.

C. Eliciting Evidence of Drug Use

Defendant complains that during cross-examination, defense counsel unwittingly elicited testimony from defendant's probation officer that shortly before the burglaries, defendant tested positive for some sort of drug use.

Presumably, counsel's cross-examination of the officer was designed to show that defendant was law abiding while on parole. However, counsel apparently assumed defendant's drug tests had been negative. Thus, counsel was incompetent insofar as he asked a question to which he did not know the answer, and the answer indicated drug use. Thereafter, in an effort to explain, defendant said he had mistakenly smoked a marijuana cigarette he did not know was laced with cocaine. Later the prosecutor described defendant as someone who uses drugs and denies criminal responsibility by claiming mistake.

Since we must reverse the second count of burglary, we focus on whether the evidence of drug use was prejudicial concerning the first burglary. We think not. Again, the primary factual issue was simply whether defendant entered Newsome's or Auble's apartment. The evidence about drug use was not extensive or inflammatory, and given Bradke's testimony, we do not find a reasonable probability of acquittal on this count had the evidence of drug use not come out.

D. Failure to Subpoena Vicky Bell

Defense counsel sought to examine defendant's mother about admissions allegedly made to her by Vicky Bell to the effect that the burglary was her, not defendant's fault. The court sustained the prosecutor's objection on the ground that defense counsel had failed to subpoena Bell and thus had not made a sufficient showing that Bell was unavailable to testify herself. Although defense counsel said he was unaware of Bell's whereabouts and had

relied on the prosecutor's unsuccessful efforts to locate her, the court concluded that defense counsel should have made his own attempt based on information about where Bell's father lived and that she stayed with him from time to time.

Assuming counsel should have made his own effort to subpoena Bell, we find no prejudice with respect to defendant's conviction for the first burglary. Defendant was seen helping Bell enter Auble's apartment through the window and then entering himself. Given Bradke's testimony, we find no reasonable probability of an acquittal on this count had counsel sought to subpoena Bell.

Indeed, defendant claims prejudice primarily with respect to the second count, arguing that if Bell testified that defendant was only trying to help her escape, the jury might have acquitted him of burglary and at most found him guilty of being an accessory. Since we must reverse this count, we need not discuss this argument.

E. Failure to Object to Evidence of Arrest

Defendant claims counsel should have objected to Officer Sole's testimony that he interviewed defendant in jail after his arrest for some type of "domestic disturbance." He argues that the testimony amounted to "other crimes" evidence, which was inadmissible to prove bad character and irrelevant to prove any other issues.

Officer Sole's comment was brief, he made it in passing, and no details about the "disturbance" were elicited from him. Thus, even assuming an objection should have been made and the

reference stricken, we do not find a reasonable probability that the jury would have acquitted defendant of the first burglary.[15]

VI. "Three Strikes" Issues

A. Prior Convictions as "Strikes"

Defendant notes that section 667, subdivision (d)(1), provides, "The determination of whether a prior conviction is a prior felony conviction [i.e., a "strike"] for purposes of [the "three strikes" law], shall be made upon the date of that prior conviction . . . ." (Emphasis added.) He argues that because his prior convictions predate the "three strikes" law, they do not qualify as "strikes." We disagree.

In People v. Murillo (1995) 39 Cal.App.4th 1298, this court rejected the identical claim. Moreover, numerous other courts have rejected this argument. (See, e.g., People v. Turner (1995) 40 Cal.App.4th 733 [Second Dist., Div. Five]; Gonzales v. Superior Court (1995) 37 Cal.App.4th 1302 [Fifth Dist.]; People v. Sipe (1995) 36 Cal.App.4th 468 [Third Dist.]; People v. Green (1995) 36 Cal.App.4th 280 [Second Dist., Div. Two]; People v. Reed (1995) 33 Cal.App.4th 1608 [First Dist., Div. Five].)

Defendant adds nothing new to this claim, and we still find it meritless.

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[15] We need not separately discuss defendant's petition for a writ of habeas corpus, which, as noted above, reiterates defendant's claim of ineffective assistance. Given our analysis and conclusion concerning the various grounds for claiming ineffective assistance, the petition is denied.

B. Discretion to Strike or Dismiss Prior Convictions

At sentencing, defendant filed a written request to have the court strike his prior convictions under section 1385 in the furtherance of justice. The court denied the request, ruling that it was bound by a recent appellate court decision, which held that under the "three strikes" law, trial courts lack discretion to strike prior convictions sua sponte in furtherance of justice.

Defendant now contends that the trial court erred in ruling that it lacked discretion to strike his prior convictions. During and after briefing in this case, the issue concerning the trial court's discretion was before our Supreme Court. It recently filed People v. Superior Court (Romero) (1996) 13 Cal.4th 497, in which it held that under the "three strikes" law, trial courts retain the discretion to strike prior serious felony conviction allegations under section 1385, subdivision (a). (Id. at p. 504.)

Because the trial court did not realize it had such discretion, the matter must be remanded and the court given the opportunity to exercise it. (Cf. People v. Fritz (1985) 40 Cal.3d 227, 231; People v. Belmontes (1983) 34 Cal.3d 335, 348, fn. 8.)

C. Urgency Legislation

Defendant contends that section 667 was improperly enacted as urgency legislation because it substantially changes the duties of judges and prosecutors. Thus, he claims the

legislation was not in effect when he committed his offenses. This claim is also meritless.

On March 7, 1994, the Governor signed the "three strikes" law, which added subdivisions (b) to (i) to section 667. The bill was passed on an urgency basis and became effective immediately.

Article 4, section 8, subdivision (d), of the California Constitution provides, in relevant part, "Urgency statutes are those necessary for immediate preservation of the public peace, health, or safety. A statement of facts constituting the necessity shall be set forth in one section of the bill. . . . An urgency statute may not create or abolish any office or change the . . . duties of any office . . . ."

In enacting the "three strikes" amendments to section 667, the Legislature declared, in pertinent part, "This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article [4] of the Constitution and shall go into immediate effect. The facts constituting the necessity are: [¶] In order to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious or violent felony offenses, and to protect the public from the imminent threat posed by those repeat felony offenders, it is necessary that this act take effect immediately." (See Stats. 1994, ch. 12, § 2; No. 2 West's Cal. Legis. Service, p. 59.)

We give great deference to the Legislature's findings concerning the need for urgency legislation. (See Davis v. County of Los Angeles (1938) 12 Cal.2d 412, 422; Verreos v. City and County of San Francisco (1976) 63 Cal.App.3d 86, 101.) We further note that "[a]n addition or subtraction in relation to the volume of the duties required to be performed by an officer, which does not substantially affect the primary duties of his office, is not such a change of duties as would prevent immediate effectiveness of legislation properly declared to be urgent." (Martin v. Riley (1942) 20 Cal.2d 28, 37; accord: People v. Robertson (1982) 33 Cal.3d 21, 47.)

Here, the "three strikes" amendments limit the discretion of prosecutors in dealing with prior convictions. They must now plead and prove all known priors and may not use them in plea bargaining or agree to dismiss or strike them. (§ 667, subds. (f)(1) and (g).) They may, however, move to strike prior conviction allegations in furtherance of justice or for insufficient evidence. (§ 667, subd. (f)(2) The amendments did not alter the trial court’s discretion to strike priors.

The changes noted above do not substantially affect the primary functions of the prosecutor and court. Prosecutors may still move to have prior convictions stricken; courts may strike them; and courts are still responsible for imposing the sentence. In the recidivist cases, to which the amendments may apply, we do not find that the changes have such a substantial affect on the duties of prosecutors and courts that the Legislature could not

enact them by urgency measure. (See People v. Kinsey (1995) 40 Cal.App.4th 1621 [reaching same conclusion]; People v. Cartwright (1995) 39 Cal.App.4th 1123 [same]; see People v. Kilborn (1996) 41 Cal.App.4th 1325 [limitations on prosecutorial discretion nor violation of separation of powers]; cf. also People v. Robertson, supra, 33 Cal.3d 21 [same re changes in death penalty statute]; §§ 1385, subd. (b) and former 667, Stats. 1986, ch. 85, §§ 1.5, 2, 4, pp. 211-212 [urgency legislation eliminating court's discretion to strike priors for enhancement purposes].)[16]

VII. Disposition

Defendant's conviction on Count 2 (the second burglary) is reversed. The remaining conviction is affirmed. However, the judgment is vacated, and the matter remanded for further proceedings, including resentencing.

The petition for a writ of habeas corpus is denied, the denial to become effective upon the finality of our decision on defendant's appeal. (See Cal. Rules of Court, rule 24(a); cf. People v. Leever (1985) 173 Cal.App.3d 853, 881.)

Wunderlich, J.

[16] Our reversal of one burglary conviction renders it unnecessary to consider defendant's other "three strikes" claims, i.e., that the court erred in (1) failing to exercise discretion to impose concurrent sentences for the two current burglaries, (2) in imposing two consecutive 25-year-to-life sentences for the two current burglaries, and (3) imposing two five-year enhancements consecutive to the two terms for the current burglaries.

I CONCUR:

Cottle, P.J.

BAMATTRE-MANOUKIAN, J., Concurring and Dissenting. — I respectfully disagree with my colleagues' conclusion that the trial court erred by instructing in the language of CALJIC No. 14.54 (1994 Revision), which is based directly on the Supreme Court's decision, filed ten weeks after the burglaries in this case, in People v. Montoya (1994) 7 Cal.4th 1027, 1046.

In Montoya the Supreme Court explicitly stated that the pre-Montoya instruction which my colleagues believe should have been given in this case "is an incorrect statement of the law and should not be given in any case." (7 Cal.4th at p. 1047.) From the words "in any case" I infer that the Supreme Court itself believed its holding should be retroactively applicable at least to any case in which the jury had not yet been instructed, if not to any case not yet final at the time Montoya was filed.

I cannot agree with my colleagues that Montoya's construction of the burglary and aiding and abetting statutes was "not reasonably foreseeable" by reference to prior case law. People v. Cooper (1991) 53 Cal.3d 1158, 1160-1161, and People v. Escobar (1992) 7 Cal.App.4th 1430, 1436, both of which the Supreme Court cited and discussed in its Montoya opinion, were decided, respectively, nearly three years and nearly two years before the burglaries in this case. In my opinion, both Cooper and Escobar clearly reflected the judiciary's heightened

recognition of the nature and purpose of aider and abettor liability and the importance of the victim's perspective. The reasoning of Montoya is wholly consistent with those cases, as the court itself pointed out. (7 Cal.4th at pp. 1040-1041, 1046.) I believe Montoya represents an entirely foreseeable extension of the principles expressed in Cooper and Escobar. Therefore its retroactive application does not result in a denial of due process.

I would conclude that the trial court did not err by instructing in accordance with Montoya. In all other respects, I agree with the conclusions reached in the majority opinion.

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Bamattre-Manoukian, J.

Trial Court:	Santa Clara County Superior Court
Trial Judge:	Honorable RICHARD C. TURRONE
Attorney for Defendant/ Appellant and Petitioner:	MICHAEL A. WILLEMSEN By Appointment of the Sixth District Appellate Program
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